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Constitutional Law -- Racial Segregation -- Public Housing

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CONSTITUTIONAL LAW—RACIAL SEGREGATION—PUBLIC HOUSING

Action in a state court to compel the Public Housing Authority to admit petitioners into a low-cost housing project, without regard to race or color. The Authority had been granting applications based on its evaluation of the applicants' needs and relative hardship, but with an overriding policy of preserving the same racial composition in the housing project as existed in the surrounding neighborhood. *Held*, the "racial pattern" scheme violates the equal protection clause of the Fourteenth Amendment,[1] and similar clauses in the state constitution.[2] *Banks v. Housing Authority*, 260 P.2d 668 (Cal. 1953).

Those cases which attempt to define the limits of the Fourteenth Amendment, as it applies to racial segregation and discrimination, are not easy to reconcile with each other. Under one line of authority, marked by the leading case of *Plessy v. Ferguson*,[3] segregation per se is not a violation of the equal protection clause of the Fourteenth Amendment, provided "equal but separate" facilities[4] are made available to both white and colored races. Jurisdictions which follow the "equal but separate" doctrine apply it to the use of public facilities,[5] and generally hold that the equal protection clause is violated where other rights, such as the right to serve on juries,[6] or the right to vote,[7] are unequally conferred by law.

This line of authority has met with some favor by those courts which apparently wish to uphold segregation or discrimination in one form or another, and whose research seemingly never leads them to more liberal authority.[8] As may be expected, these courts differ noticeably in their interpretation of the word "equal."[9]

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1. U.S. CONST. AMEND. XIV, § 1.
2. CALIF. CONST. Art. I, §§ 1, 13, 21.
3. 163 U.S. 537 (1896).
4. *Id.* at 547. The phrase "equal but separate" apparently originated in Miss. ACTS 1888, p. 48, which provided that railroads should furnish equal but separate accommodations for white and colored passengers. The constitutionality of this statute was upheld in Louisville, New Orleans & Texas Ry. v. Mississippi, 133 U.S. 587 (1890). The court in the *Plessy* case relied heavily on this decision.
5. Hayes v. Crutcheon, 108 F. Supp. 582 (M.D. Tenn. 1952); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W.Va. 1948); Rice v. Arnold, 54 So.2d 114 (Fla.), *cert. denied*, 342 U.S. 946 (1951); Harris v. St. Louis, 233 Mo. App. 911, 111 S.W.2d 995 (1938).
6. Avery v. State, 209 Ga. 116, 70 S.E.2d 716 (1952), *rev'd*, 345 U.S. 559 (1953); Zimmerman v. State, 191 Md. 7, 59 A.2d 675 (1948); Lee v. State, 163 Md. 56, 161 Atl. 284, *cert. denied*, 290 U.S. 639 (1933).
7. Adams v. Terry, 193 F.2d 600 (5th Cir.), *rev'd*, 345 U.S. 461 (1952); Byrd v. Brice, 104 F. Supp. 442 (W.D. La.), *aff'd*, 201 F.2d 664 (1953); Brown v. Baskin, 78 F. Supp. 933 (E.D. S.C. 1948).
8. Strauder v. West Virginia, 100 U.S. 339 (1879); Kerr v. Enoch Pratt Free Library of Baltimore, 149 F.2d 212 (4th Cir. 1945); Lopez v. Secombe, 71 F. Supp. 769 (S.D. Cal. 1944); Mills v. Lowndes, 26 F. Supp. 792 (D. Md. 1939); see also notes 11 and 16 *infra*.
9. *Compare* Sweeney v. Louisville, 102 F. Supp. 525 (W.D. Ky. 1951), *with* Beal v. Holcombe, 103 F. Supp. 218 (S.D. Tex. 1950), *rev'd*, 193 F.2d 384 (1951).

A compelling weight of authority may be found which, in effect, if not in words, rejects the reasoning of the *Plessy* case, and holds that equality of treatment is not the test, but that segregation or any distinction in treatment by operation of law is, in itself, repugnant to the equal protection clause.[10] Decisions may also be found which arrive at the same result without recourse to the Fourteenth Amendment.[11] In one case[12] a state statute[13] requiring segregation in buses was held unconstitutional by the Supreme Court as an undue burden on interstate commerce.[14] The Supreme Court, in the now leading case, *Shelley v. Kraemer*,[15] by implication discredited[16] the rule in the *Plessy* case, but seemed careful to avoid expressly overruling it.

As is true of cases dealing with other types of racial discrimination, the cases concerning housing projects have been the source of seemingly conflicting decisions. An important case in this field is *Dorsey v. Stuyvesant*,[17] in which discrimination against negroes in the selection of tenants in a *private* housing project, was held *not* unconstitutional, on the grounds that the Fourteenth Amendment applies to state action only, not to the activities of private individuals or groups. In one respect, the reasoning of the court seems in conflict with the *Shelley* case, in which it was held that judicial enforcement of a private agreement constituted state action.[18] Assuming for the moment that the action of the Stuyvesant

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The court in the *Sweeney* case compelled the city to provide a fishing lake in the "colored" park, similar to that in the "white" park. The court in the *Beal* case, in disposing of the absence of a golf course in a park for its colored inhabitants, said:

> While it does not affirmatively appear that the out-of-door facilities provided by the city in the parks include many worthy games and activities of other and former days such as town ball, mumble peg, tournaments, ring base, bush ranger, etc., it does appear that the city with wholesome care has provided for present-day activities of both races. I do not think the failure to provide golf courses in parks used by the negroes is either as a matter of law or fact a discrimination against the negroes. *Id.* at 219.

See also 67 HARV. L. REV. 377 (1954).

10. Jones v. Newlon, 81 Colo. 25, 253 Pac. 386 (1927); Seawell v. MacWithey, 2 N.J. 463, 67 A.2d 309 (1949); Bullock v. Wooding, 123 N.J.L. 176, 8 A.2d 273 (1939); Patterson v. Board of Education, 11 N.J. Misc. 179, 164 Atl. 892 (1933); Bruster v. State, 40 Okla. Cr. 25, 266 Pac. 486 (1928); see also note 16, *infra*.

11. For three cases involving the interpretation of civil rights statutes, see Evans v. Fong Poy, 42 Cal. App.2d 320, 108 P.2d 942 (1941); Delaney v. Central Valley Golf Club, 289 N.Y. 576, 43 N.E.2d 716 (1942); McCrary v. Jones, 39 N.E.2d 167 (Ohio 1941); see also 56 YALE L.J. 837 (1947).

12. Morgan v. Virginia, 328 U.S. 373 (1946).

13. VA. CODE § 4097dd (1942).

14. See also Day v. Atlantic Greyhound Corp., 171 F.2d 59 (4th Cir. 1948); Williams v. Carolina Coach Co., 111 F. Supp. 329 (E.D. Va. 1952).

15. 334 U.S. 1 (1948).

16. *Id.* at 21. Footnote 28 in the court's opinion makes the following comment:

> It should be observed that the restrictions relating to residential occupancy contained in ordinances involved in the Buchanan, Harmon and Deans cases, cited supra, and declared by this Court to be inconsistent with the requirements of the Fourteenth Amendment, applied equally to white persons and Negroes . . . .

17. 299 N.Y. 512, 87 N.E.2d 541, *cert. denied*, 339 U.S. 981 (1949), 4 MIAMI L.Q. 102.

18. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

Town Corporation did not in itself constitute state action, did not the holding of this court which gave effect to the discrimination, constitute state action within the reasoning of the *Shelley* case? The distinction between judicial enforcement of private discrimination (held unconstitutional) and judicial refusal to enjoin private discrimination seems a narrow one.

A New Jersey court was faced with the issue of segregation in a *public* housing project in *Seawell v. MacWithey*.[19] Distinguishing the facts from those of the *Dorsey* case, the court held that segregation by governmental action fell within the prohibition of the Fourteenth Amendment. The court discussed and explicitly rejected the "equal but separate" rule.[20]

A case identical in fact situation with the principal case is *Favors v. Randall*.[21] The enforcement by the housing authority of a racial pattern was specifically in issue. The court cited as authority the *Plessy* case and several other Supreme Court decisions[22] which adhered to the "equal but separate" doctrine, and concluded that the selection of tenants in accordance with the "neighborhood pattern" did not destroy the legal equality of the races.[23] The rationale of this holding is logical in that white tenant-applicants would be excluded in equal proportion to colored, should an excessive number of applications be received. What should happen if the scheme resulted in vacancies which could not be filled except by deviating from the pattern, the court does not say.

The principal case, *Banks v. Housing Authority*, treats the problem as one of first impression. The court cites no prior California authority, but relies, with one exception, on Supreme Court decisions.[24] The defendant housing authority cited the *Favors* case as authority for the constitutionality of its action.[25] The court discussed the *Favors* case

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19. 2 N.J. Super. 255, 63 A.2d 542 (Ch. 1949), *aff'd and modified*, 2 N.J. 563, 67 A.2d 309 (1949), 4 RUTGERS L. REV. 506.

20. *Id.* at 265, 63 A.2d at 546.

21. 40 F. Supp. 743 (E.D. Pa. 1941).

22. Mitchell v. United States, 313 U.S. 80 (1940); Gong Lum v. Rice, 275 U.S. 78 (1927); McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151 (1914); Plessy v. Ferguson, 163 U.S. 537 (1896).

23. 40 F. Supp. at 747.

> . . . the argument cannot be accepted that equal rights cannot be secured to the negro, except by an enforced comingling of the two races. Neither the Thirteenth, Fourteenth, nor Fifteenth Amendments to the United States Constitution operate to make the negro race wards of the nation . . . .

24. Henderson v. United States, 339 U.S. 816 (1949); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1949); Sweatt v. Painter, 339 U.S. 629 (1949); Shelley v. Kraemer, 334 U.S. 1 (1948); Mitchell v. United States, 313 U.S. 80 (1940); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Richmond v. Deans, 281 U.S. 70 (1929); Harmon v. Tyler, 273 U.S. 668 (1926); Buchanan v. Warley, 245 U.S. 60 (1917); McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151 (1914); Wo v. Hopkins, 118 U.S. 356 (1885); Birmingham v. Monk, 185 F.2d 859 (5th Cir.), *cert. denied*, 341 U.S. 940 (1951).

25. Banks v. Housing Authority, 260 P.2d 668, 678 (Cal. 1953).

in its opinion,[26] and rejected its holding on somewhat dubious grounds.[27] Faced by the need of overcoming the "equal but separate" rule,[28] the court declares, "Appellants by reason of their proportionate racial needs and neighborhood pattern policies are not furnishing and have prevented themselves from furnishing housing accommodations to persons of low income 'upon the basis of equality of right.' "[29] The court further reasons that if judicial enforcement of racial segregation schemes is repugnant to the Fourteenth Amendment,[30] it would be anomalous to permit enforcement of such a scheme by the executive branch of a state government. In effect, the court simply holds that it is unconstitutional for the housing authority to consider the color or race of an applicant in any manner.

In conclusion it appears that the issue of racial segregation in, or discrimination in granting admission to, public housing projects presents basically the same constitutional problems as other forms of racial discrimination. Generally speaking, the Supreme Court seems to show the greatest willingness to find a violation of the Constitution where segregation or discrimination is in issue. The lower federal courts, while theoretically bound by the Supreme Court holdings, appear to be more readily influenced by local feeling than by stare decisis.[31] The state courts, as may be expected, range from one extreme to the other in their interpretation[32] of the Fourteenth Amendment, and seem to have no difficulty in finding authority to support practically any point of view.

Greater uniformity of decision in this field of law will probably await greater uniformity of public opinion toward racial problems.

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CONSTITUTIONAL LAW—RESTRICTIVE COVENANTS—JUDICIAL ENFORCEMENT

Plaintiff sued for damages resulting from defendant cemetery's refusal to bury her non-Caucasian husband. She had purchased a plot from defendant which, by the terms of the contract, restricted burials to members of the Caucasian race. *Held*, the restriction was not void as being

26. *Ibid.*

27. *Ibid.*

. . . the opinion . . . does not clearly indicate that the court's attention was pointedly directed to the fact that the rights of 'persons,' not groups, were involved under the 14th Amendment . . . .

28. *Id.* at 673.

29. *Id.* at 678. The court is quoting from the *Missouri* case, 305 U.S. 337 (1938).

30. See note 18 *supra.*

31. *Cf.* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Mendez v. Westminster School District, 161 F.2d 774 (9th Cir. 1947).

32. *Compare* Patterson v. Board of Education, 11 N.J. Misc. 179, 164 Atl. 892 (Sup. Ct. 1933), *with* the opinion of the Texas court in Sweatt v. Painter, 210 S.W.2d 442 (Texas 1948), *rev'd*, 339 U.S. 629 (1949), Noted in 30 B.U.L. Rev. 565 (1950).